IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRENNAN CENTER FOR JUSTICE
AT NEW YORK UNIVERSITY
SCHOOL OF LAW,

Plaintiff,

v.

U.S. DEPARTMENT OF JUSTICE,

Defendant.

Civil Action No. 18-1841 (ABJ)

PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56, Plaintiff Brennan Center for Justice at New York University School of Law (the "Brennan Center") respectfully moves for summary judgment on all claims in its Complaint. There are no genuine issues of material fact as to any of the Brennan Center's claims, and judgment as a matter of law is appropriate. This motion is supported by the accompanying Memorandum of Points and Authorities in Support of Plaintiff's Cross-Motion for Summary Judgment and Opposition to Defendant's Motion for Summary Judgment, Plaintiff's Statement of Material Facts as to Which There is No Genuine Issue in Support of Its Motion for Summary Judgment, and the Declaration of Maximillian Feldman. A proposed order also is attached. Pursuant to Local Rule 7(f), Plaintiff requests that the Court schedule an oral hearing on this motion.

April 11, 2019

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRENNAN CENTER FOR JUSTICE AT NEW YORK UNIVERSITY SCHOOL OF LAW, *Plaintiff*, v. U.S. DEPARTMENT OF JUSTICE, *Defendant*.	Civil Action No. 18-1841 (ABJ)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Plaintiff Brennan Center for Justice at New York University School of Law ("Brennan Center") is a non-partisan law and policy institute that focuses on fundamental issues of democracy and justice. Among other issues, the Brennan Center devotes substantial resources to ensuring free, fair, and accessible voting and elections for all eligible Americans.

In furtherance of that mission, on July 20, 2017, the Brennan Center submitted the Freedom of Information Act ("FOIA") request at issue here (the "NVRA FOIA") to the Civil Rights Division ("CRT") of Defendant U.S. Department of Justice ("DOJ" or the "Department"). Compl. Ex. A, ECF No. 1-5; *see also* Def.'s Statement of Material Facts ("Def.'s SMF") ¶ 1, ECF No. 21. The NVRA FOIA requested records related to a letter sent on June 28, 2017, by T. Christian Herren, Jr., the Chief of DOJ's Voting Section, to state election officials across the country, in which DOJ requested information regarding those states' procedures for compliance with federal laws governing the maintenance of voter registration lists (the "DOJ Letter"). *See* Compl. Ex. A at 1; Def.'s SMF ¶ 1. Specifically, the NVRA FOIA requested (1) all state or local election officials' responses to the DOJ Letter, and (2) all communications and documents exchanged between Government employees and "any other person" concerning the DOJ Letter. Compl. Ex. A at 2.

DOJ's obligations upon receiving the NVRA FOIA were clear. It had to make "reasonable efforts to search for the records" requested. 5 U.S.C. § 552(a)(3)(C). It had to review the records that the search turned up to determine which documents could be released, and which should be withheld. *See Citizens for Responsibility & Ethics in Washington v. Fed. Election Comm'n*, 711 F.3d 180, 186 (D.C. Cir. 2013). And for any records it decided to withhold, the Department bore the burden to justify that "nondisclosure with reasonably specific

detail" and "demonstrate that the information withheld logically falls within the claimed exemption" to FOIA. *McKinley v. FHFA*, 789 F. Supp. 2d 85, 87–88 (D.D.C. 2011).

At each turn, DOJ has failed to do what FOIA requires. The search that DOJ says it conducted was not reasonably calculated to identify records responsive to the NVRA FOIA, because it apparently was designed based on the (incorrect) assumption that the NVRA FOIA request had the same scope as an earlier request for a different set of records. As for the 20,000-plus pages of documents that DOJ's search did turn up, virtually all of them (including many that appear to be public records) were withheld *in full* with only conclusory explanations for that decision, calling into question whether DOJ properly reviewed those documents. Finally, the few arguments DOJ does offer under Exemption 7(A)—based on a risk to ongoing law enforcement proceedings—and Exemption 5—as attorney work product or covered by the deliberative process privilege—are wholly inadequate under established law.

Because the undisputed record shows that DOJ has not met its FOIA obligations or properly justified its document withholdings, the Brennan Center is entitled to judgment as a matter of law and asks this Court "to enjoin [DOJ] from withholding agency records and to order the production of [the] records improperly withheld." 5 U.S.C. § 552(a)(4)(B).

BACKGROUND

The Brennan Center submitted the NVRA FOIA to DOJ on July 20, 2017. Compl. Ex. A; Def.'s SMF ¶ 1. It requests records related to the June 28, 2017 DOJ Letter, which was described in the NVRA FOIA as follows:

> On June 28, 2017, T. Christian Herren, Jr., the Chief of the Department of Justice's Voting Section, sent a letter to all states covered by the National Voting Registration Act ('NVRA'). In this letter ('the Letter'), the Department of Justice 'request[ed] information regarding the State's procedures for compliance with the statewide voter registration list maintenance provisions of the National Voter

> Registration Act, 52 U.S.C. § 20501 et seq. and the Help America Vote Act ('HAVA'), 52 U.S.C. § 20901 et seq.

Compl. Ex. A at 1. The two specific categories of documents and communications sought by the Brennan Center were:

> 1) All documents the Department of Justice ('DOJ' or 'Department') received or receives from state or local election officials in response to the Letter.
>
> 2) All communications and documents, including but not limited to emails and memoranda, between any DOJ officer, employee, or agent, or any White House liaison to the Department, and any other person, including but not limited to any officer, employee, or agent of the White House or the Presidential Advisory Commission on Election Integrity concerning the Letter.

Id. at 2.

In May 2017, the Brennan Center had submitted a separate FOIA request to DOJ, which sought three categories of documents, each relating to the Presidential Advisory Commission on Election Integrity ("PACEI") that had been established by President Trump (the "SDNY FOIA").[1] *See* Compl. ¶¶ 8-27, *Brennan Ctr. for Justice v. U.S. Dep't of Justice*, No. 17-cv-06335 CBH, ECF No. 1 (S.D.N.Y. Aug. 21, 2017). Thus, the SDNY FOIA requested, in general

[1] The SDNY FOIA sought the following records:

> 1. All communications . . . between any [DOJ] . . . officer, employee, or agent, or any White House liaison to the Department, and any other person . . . regarding the *Presidential Advisory Commission on Election Integrity* or any other effort since November 8, 2016 to establish a commission, task force, or committee to study voter fraud or any aspect of the voting system.
>
> 2. All communications . . . between any Department officer, employee, or agent, or any White House liaison to the Department, and any member of the *Presidential Advisory Commission on Election Integrity*, other than Vice President Michael Pence, since November 8, 2016.
>
> 3. All documents relating to the *Presidential Advisory Commission on Election Integrity* or any other effort since November 8, 2016 to establish a commission, task force, or committee to study voter fraud or any aspect of the voting system . . . [.]

Compl., ¶ 27 (emphasis added).

terms, documents relating to the PACEI, whereas the NVRA FOIA separately sought documents relating to the DOJ Letter, which had not been sent out at the time the Brennan Center submitted the SDNY FOIA request.

DOJ acknowledged receipt of the NVRA FOIA on July 24, 2017. Compl. ¶ 15; Ans. ¶ 15, ECF No. 10; Declaration of Tink Cooper, Acting Chief of the Freedom of Information/Privacy Act Branch, Civil Rights Div., DOJ ("Cooper Decl.") Ex. A, ECF No. 21-1. Between November and December 2017, the Brennan Center followed up with DOJ several times regarding the request. Compl. ¶ 16; Ans. ¶ 16. Finally, in March 2018, DOJ advised the Brennan Center that it needed to coordinate with the U.S. Attorney's Office for the Southern District of New York, which was handling litigation concerning the SDNY FOIA, and inquired as to how the SDNY FOIA and NVRA FOIA requests differed. *See* Compl. ¶¶ 17-18; Ans. ¶¶ 17-18. The Brennan Center clearly explained in an e-mail, dated March 19, 2018, that the NVRA FOIA had a different scope from the SDNY FOIA. Compl. ¶ 19 & Ex. C, Ex. A thereto (noting that despite some similarities, the NVRA FOIA "does not overlap entirely with th[e SDNY FOIA] request," and that the SDNY FOIA would not "necessarily reach all DOJ documents concerning the [DOJ] Letter, or even all communications between the DOJ and persons besides the PACEI concerning the [DOJ] Letter," as the NVRA FOIA requested).

Just one day later, on March 20, 2018, DOJ sent a letter denying *in toto* the NVRA FOIA's first request for "[a]ll documents [DOJ] received or receives from state or local election officials in response to the [DOJ Letter]," invoking FOIA Exemption 7(A), 5 U.S.C. § 552(b)(7)(A), on the purported basis that "disclosure [] could reasonably be expected to interfere with law enforcement proceedings." Compl. Ex. B, ECF No. 1-6; Cooper Decl. ¶ 15; Ex. B at p. 1. DOJ also claimed that certain unspecified information within the requested records

was protected from disclosure pursuant to FOIA Exemption 5, 5 U.S.C. § 552(b)(5), "since the records consist of attorney work product and include intra-agency memoranda containing pre-decisional, deliberative material and attorney client material," and pursuant to FOIA Exemption 6, 5 U.S.C. § 552(b)(6), to the extent that "disclosure [] could reasonably be expected to constitute an unwarranted invasion of privacy." *Id.*

In response to the NVRA FOIA's second request, DOJ produced a mere 407 pages of records. Notably, every one of the 407 pages of documents produced related to the PACEI. Only three of the 407 pages even mention the DOJ Letter. Declaration of Maximillian Feldman ("Feldman Decl.") ¶ 6. Moreover, even the pages that were produced were also redacted under FOIA Exemptions 5 and 6. *Id.* at 1–2. DOJ withheld four additional pages of documents under FOIA Exemptions 7(A) and 5. *Id.* at 2.

On May 15, 2018, the Brennan Center filed a timely appeal with DOJ, which is incorporated by reference, regarding the agency's final determination concerning the NVRA FOIA. Compl. Ex. C, ECF No. 1-7; *see also* Compl. ¶ 24; Ans. ¶ 24. Almost three months later, by August 7, 2018, DOJ still had not responded to the Brennan Center's appeal, prompting the Brennan Center to file the instant case. On November 14, 2018, after the Brennan Center filed its complaint, DOJ issued a supplemental response to the NVRA FOIA consisting entirely of publicly available court documents filed in the Eastern District of Kentucky in *Judicial Watch v. Grimes*, No. 3:17-cv-0094 (E.D. Ky.). Cooper Decl. ¶ 16; *id.* Ex. C. DOJ did not release any of the approximately 20,200 pages of additional responsive documents it had identified, citing FOIA Exemptions 5, 6, and 7(A) and (C).[2] Cooper Decl. ¶ 16; Mem. of Points & Authorities in

[2] While the Brennan Center does not object in the abstract to DOJ's withholdings of witnesses' names, personal addresses, telephone numbers, and personal e-mail addresses, DOJ has not met

Supp. of Def.'s Mot. for Summ. J. ("Def.'s Br.") at 4–15, ECF No. 21. Instead, it provided a *Vaughn* index on November 29, 2018, purporting to justify its generic invocation of these Exemptions. Summ. Categorical Index ("*Vaughn* Index"), ECF No. 21-3.

LEGAL STANDARD

DOJ is not entitled to summary judgment unless it shows "that its search for responsive records was adequate, that any exemptions claimed actually apply, and that any reasonably segregable non-exempt parts of records have been disclosed after redaction of exempt information." *Competitive Enter. Inst. v. EPA*, 232 F. Supp. 3d 172, 181 (D.D.C. 2017). In the FOIA context, "[t]his burden does not shift even when," as here, "the requester files a cross-motion for summary judgment." *Prop. of the People, Inc. v. Office of Mgmt. & Budget*, 330 F. Supp. 3d 373, 380 (D.D.C. 2018) (internal quotation marks omitted). That is because the agency "has the onus of proving that the documents are exempt from disclosure, while the burden upon the requester is merely to establish the absence of material factual issues." *Id.* (internal quotation marks omitted); *see also* Fed. R. Civ. P. 56(a).

As to DOJ's burden to demonstrate the adequacy of its search, it must show "beyond material doubt that its search was reasonably calculated to uncover all relevant documents." *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 325 (D.C. Cir. 1999) (internal quotation marks omitted). The agency must have "made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested." *Oglesby v. U.S. Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990). If "the record

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its burden to demonstrate that FOIA Exemptions 6 and 7(C) have any application to particular documents that have been withheld in this case. Indeed, its *Vaughn* index fails to identify which, if any, documents were withheld pursuant to those exemptions, much less provide any explanation of the basis on which those exemptions might apply to the particular withheld documents. *See* ECF No. 21-3.

leaves substantial doubt as to the sufficiency of the search, summary judgment for the agency is not proper." *Truitt v. U.S. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990).

In addition, "FOIA unambiguously places on an agency the burden of establishing that records are exempt." *Elec. Privacy Info. Ctr. v. Internal Revenue Serv.*, 910 F.3d 1232, 1238 (D.C. Cir. 2018). FOIA's exemptions are "explicitly made exclusive," and must be "narrowly construed." *Milner v. U.S. Dep't of the Navy*, 562 U.S. 562, 565 (2011) (quoting *FBI v. Abramson*, 456 U.S. 615, 630 (1982)). And "even if an agency establishes an exemption, it must nonetheless disclose all reasonably segregable, nonexempt portions of the requested record(s)." *Assassination Archives & Res. Ctr. v. CIA*, 334 F.3d 55, 57 (D.C. Cir. 2003); *see also Farrugia v. Exec. Office for U.S. Attorneys*, No. 04-cv-294 PLF, 2006 WL 335771, at *8 (D.D.C. Feb. 14, 2006) (If an agency withholds a full record based on its view that nonexempt portions are not reasonably segregable, it must show the nonexempt portions are "inextricably intertwined" with exempt portions.).

ARGUMENT

The undisputed record establishes that DOJ has violated its FOIA obligations several times over. Its *Vaughn* index and the accompanying Cooper Declaration make clear that the agency failed to conduct a reasonable search for records responsive to the NVRA FOIA, and improperly withheld documents pursuant to FOIA Exemptions 5 and 7(A). The Brennan Center therefore requests that this Court enter summary judgment in its favor on all claims.[3] As to the

[3] The Brennan Center requested expedited processing of the NVRA FOIA pursuant to the FOIA statute and DOJ's regulations. Compl. ¶ 10 & Ex. A at 1. Count III of the Complaint seeks declaratory and injunctive relief, requiring DOJ to grant expedited processing in any future administrative-level proceedings in response to the NVRA FOIA. *See id.* ¶¶ 40–47. DOJ was required to provide a determination of whether to provide expedited processing, with notice to the requestor, within ten days after the date of the request. 5 U.S.C. § 552(a)(6)(E)(I). DOJ's

search, this Court should direct DOJ to undertake a new search that identifies all documents responsive to the NVRA FOIA and to turn over those records on an expedited basis. And as to those responsive records that DOJ has already identified and wrongfully withheld, this Court should order DOJ to produce the records. At a minimum, DOJ should be directed to amend its deficient *Vaughn* index.

I. DOJ'S SEARCH WAS FACIALLY INADEQUATE.

It is DOJ's burden to establish that it conducted a good-faith search "reasonably calculated to uncover all relevant documents." *Nation Magazine, Washington Bureau v. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995) (agency must construe the scope of a FOIA request "liberally"); *Valencia-Lucena*, 180 F.3d at 325–26. To satisfy this burden, an agency must do more than "generally assert[] adherence to the reasonableness standard." *Morley v. CIA*, 508 F.3d 1108, 1122 (D.C. Cir. 2007). Instead, it must show that it made a "good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested." *Oglesby*, 920 F.2d at 68. An agency may rely on declaration testimony to show that reasonable methods were used, but must "explain in reasonable detail the scope and method of the search" to demonstrate its "compliance with the obligations imposed by FOIA." *Perry v. Block*, 684 F.2d 121, 127 (D.C. Cir. 1982). Far from meeting that burden, the Cooper Declaration here demonstrates the facial unreasonableness of

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letter of response confirming receipt of the NVRA FOIA, dated July 24, 2017, did not specifically address the Brennan Center's request for expedited processing and indicated instead that "some delay may be encountered in processing your request." *See* Cooper Decl. ¶ 3 & Ex. A. To date, DOJ has said nothing more about any decision whether to expedite processing of the NVRA FOIA. The Brennan Center thus is entitled to judgment as a matter of law on Count III. DOJ did not seek summary judgment on Count III.

DOJ's search in response to the NVRA FOIA, because it shows that DOJ's search was not designed to capture the records that the NVRA FOIA requested.

As discussed *supra* at pages 2–4, the crux of the NVRA FOIA was communications and documents *in response to or concerning the DOJ Letter*. Compl. Ex A at 2. The Cooper Declaration, however, does not describe a search reasonably calculated to uncover the requested records concerning the DOJ Letter—the list of the "broad search terms" that DOJ used shows that the focus of the search was the PACEI, not the DOJ Letter. Indeed, *all* of the terms listed in the Cooper Declaration are related to the PACEI.[4] *See* Cooper Decl. ¶¶ 11–12. None of these search terms seeks to identify potentially responsive records "concerning" the DOJ Letter—that is, the specific records expressly sought by the request. Nor do these search terms reflect any effort to identify responsive records regarding the DOJ Letter with any correspondents other than the PACEI members. These substantive deficiencies of the search terms demonstrate that DOJ's search is unlikely to have uncovered all relevant documents and, consequently, DOJ has failed to meet its burden to show that it conducted a good faith search "using methods which can be reasonably expected to produce the information requested." *Oglesby*, 920 F.2d at 68.

That is not all. The Cooper Declaration does not identify any of the "almost 80 custodians identified as potentially having responsive records" whose documents were searched.

[4] The Cooper Declaration states that the terms "Presidential Advisory Commission, Presidential Advisory Commission on Election Integrity, PACEI, 'Election Integrity Commission' NEAR 'voting system,' 'task force' NEAR vote NEAR fraud, Study NEAR 'voting system,' Pence, Kobach, Lawson, Gardner, Dunlap, Blackwell, McCormick, Dunn, Rhodes, von Spakovsky, Adams, King, and Borunda" were searched. Cooper Decl. ¶ 12. The terms "Pence, Kobach, Lawson, Gardner, Dunlap, Blackwell, McCormick, Dunn, Rhodes von Spakovsky, Adams, King, and Borunda" each refer to the surnames of former members of the now-disbanded PACEI. The Cooper Declaration also notes that the Civil Rights Division had "received several FOIA requests relating to the [PACEI]," and that the search DOJ conducted "encompassed the search terms and parameters of these similar FOIA requests." Cooper Decl. ¶ 11.

Cooper Decl. ¶ 11. Given that the search terms used by DOJ show that it misinterpreted the NVRA FOIA as seeking only PACEI-related documents, rather than all records related to the DOJ Letter, there is reason to question whether these unidentified "80 custodians" included all individuals whose responsibilities related to the DOJ Letter. Furthermore, due to the lack of detail in the Cooper Declaration, there is no way the Brennan Center or the Court can fairly evaluate whether DOJ searched the records of all relevant custodians. For this additional reason, DOJ has failed to meet its burden to show that its search could be "reasonably expected" to produce the correct universe of documents. *Oglesby*, 920 F.2d at 68.

These facial deficiencies in DOJ's search are enough, standing alone, to justify summary judgment in favor of the Brennan Center. But if that were not enough, the timing of DOJ's response to the NVRA FOIA casts additional doubt on the adequacy of its search. As noted above, DOJ did not initially seem to understand that there was a difference between the two FOIA requests. The Brennan Center responded to DOJ's inquiry in this regard on March 19, 2018, explaining the distinctions between the NVRA FOIA and the SDNY FOIA. *See* Compl. Ex. C, Ex. A thereto. It seems impossible that DOJ could have taken these distinctions into account in performing its search, because the very next day, on March 20, 2018, DOJ made its purportedly full response to the NVRA FOIA, including a production consisting almost entirely of records (all but three pages) that already had been produced in response to the SDNY FOIA. Feldman Decl. ¶ 6; *see also* Compl. Ex. C at 3. DOJ's November 14, 2018, supplemental response to the NVRA FOIA, releasing approximately 100 pages of publicly available court documents filed in the Eastern District of Kentucky in *Judicial Watch v. Grimes*, No. 3:17-cv-0094 (E.D. Ky.), *see* Cooper Decl. ¶ 16; *id.* Ex. C, did not close this gap in information. Rather,

as confirmed in the Cooper Declaration, DOJ apparently continues to take the position that there is no additional searching to be done.

Finally, to the extent DOJ believes that the only documents or communications it possesses related to the DOJ Letter would *also* relate to the PACEI, it has failed to articulate any reason to believe why that would be so. To the contrary, in its letter to Senator Whitehouse produced in response to the NVRA FOIA, DOJ took the position that it "did not coordinate the sending of its June 28th letter with the [PACEI]." Feldman Decl. ¶ 7 & Ex. B. Furthermore, a 100-page production by DOJ in response to the SDNY FOIA on April 27, 2018 included a series of redacted e-mails regarding DOJ's response to an op-ed regarding the DOJ Letter. *See* Compl. Ex. C, Ex. B thereto. Those documents, which *are* responsive to the NVRA FOIA, were not included in DOJ's original or supplemental productions, Feldman Decl. ¶ 8, and demonstrate that the agency could not, at any point, have undertaken a search "reasonably calculated to uncover all relevant documents" in response to the NVRA FOIA. *See Nation Magazine*, 71 F.3d at 890. Rather, they provide "positive indications of overlooked materials" and "raise[] substantial doubt" as to the adequacy of DOJ's search. *Valencia-Lucena*, 180 F.3d at 326 (quoting *Founding Church of Scientology v. Nat'l Sec. Agency*, 610 F.2d 824, 837 (D.C. Cir. 1979) (further citations omitted)). Summary judgment in favor of DOJ is inappropriate in these circumstances. *Id.*

Because DOJ has not met its burden to show that its search was "reasonably calculated" to uncover all responsive records, *Nation Magazine*, 71 F.3d at 890, the Brennan Center is entitled to judgment as a matter of law on the adequacy of the search. *See* 5 U.S.C. § 552.

II. DOJ'S *VAUGHN* INDEX IS INADEQUATE TO SATISFY ITS BURDEN TO IDENTIFY THE DOCUMENTS REVIEWED AND ITS BASES FOR WITHHOLDING THOSE DOCUMENTS.

DOJ's *Vaughn* index is likewise facially inadequate. The purpose of a *Vaughn* index is to solve the "asymmetrical distribution of knowledge" inherent in FOIA cases. *Judicial Watch, Inc. v. Food & Drug Admin.*, 449 F.3d 141, 146 (D.C. Cir. 2006) (internal quotation marks omitted). An index is supposed to give the requestor enough information to challenge the government's withholding decisions, and to give the reviewing court enough information to evaluate that challenge. *See Keys v. U.S. Dep't of Justice*, 830 F.2d 337, 349 (D.C. Cir. 1987). In this way, a properly-produced index balances an agency's claim that records are subject to withholding with its burden to demonstrate that such records are, in fact, subject to withholding under FOIA.

DOJ's *Vaughn* index does not satisfy these standards. DOJ has withheld 20,221 pages of documents responsive to the Brennan Center's request *in full* (and portions of an additional 6 pages) based on two FOIA exemptions. *See* ECF No. 21-3. Yet all it has provided to justify the withholding of more than 20,000 pages of documents is a four-page index, along with an accompanying declaration filled with conclusory statements regarding the two exemptions. *See id.*; Cooper Decl. ¶¶ 17–27. DOJ does not adequately describe the documents that its search did identify, and it does not adequately explain or support the bases on which it has withheld nearly *all* of the responsive records. It therefore has not met it burden to establish that the exemptions mentioned in the *Vaughn* index are, in fact, justified.[5] As a result, the Brennan Center is entitled

[5] The lack of detail—descriptive or analytical—in the *Vaughn* index makes it difficult to assess the FOIA exemptions DOJ references. But, as discussed in greater detail *infra* at 19–32, what detail DOJ did provide is not enough to meet its burden of establishing all the elements necessary to justify withholding all of the responsive records on the basis of the exemptions it invokes.

to summary judgment, an order directing DOJ to produce the requested records, or, at a minimum, an order directing DOJ to prepare an adequate index.

A. The Index Does Not Adequately Identify the Documents Reviewed.

The starting task for a *Vaughn* index is to "describe each document or portion thereof withheld." *See King v. U.S. Dep't of Justice*, 830 F.2d 210, 223 (D.C. Cir. 1987); *see also Bagwell v. U.S. Dep't of Justice*, No. 15-cv-00531, 2015 WL 9272836, at *4 (D.D.C. Dec. 18, 2015) (describing this requirement as necessary for the agency "[t]o achieve the necessary level of descriptive accuracy"). DOJ's four-page index, which divides the 20,000-plus pages of entirely withheld documents into only four groups, dealt with in summary fashion, does not meet this first requirement.

The index describes the first three groups only as Civil Rights Division e-mails, for which it invokes Exemptions 5 and 7(A). *See Vaughn* Index at 1, 2. The description of the documents in the fourth group—20,217 pages in all—is even more generalized, describing the records only as "includ[ing] multiple emails, letters, and other types of documents" that "include narrative as well as various additional items such as legislation, draft versions of proposed bills, bills, regulations, codes, policies, guidance, brochures, [] election manuals or descriptions regarding voter registration procedures, election processes, convicted felons, and death notices," "discussion of case law on particular issues," and "supplemental responses." *Vaughn Index* at 3. Lumping over 20,000 pages of documents into only four groups, accompanied by generic descriptions of those documents, is plainly insufficient under established law, as it does not give either the Brennan Center or this Court enough information to meaningfully evaluate DOJ's withholding decisions. Indeed, courts in this district have previously held that an index falls "well short" of the standard for a *Vaughn* index where it groups together "vast quantities of documents for which Defendant offer[ed] only one short paragraph of justification," concluding

that such an index "does not offer a useable point of reference to negotiate these thousands of pages of withholdings." *Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Justice*, 955 F. Supp. 2d 4, 15 (D.D.C. 2013); *see also Ctr. for Biological Diversity v. EPA*, 279 F. Supp. 3d 121, 144 (D.D.C. 2017) (describing an index as "[b]oth substantively and structurally, . . . patently insufficient" where it "provide[d], at best, thin descriptions of broad categories of materials, paired with assertions that merely parrot legal conclusions" (internal quotation marks omitted)).

The generic invocations of the exemptions that DOJ references are equally inadequate, as they do not contain the detail that would be needed to test the sufficiency of those exemptions. As to Exemption 7(A), while a description of documents withheld separated into discrete, functional categories rather than document-by-document may sometimes be appropriate, that is not the case where, as here, the index lumps multiple categories into one description so generic that it fails to establish in a concrete way that the exemption applies. DOJ's *Vaughn* index here fails in this regard, as it fails to break out the various categories of records withheld, let alone explain "how each category of documents, if disclosed, would interfere with the investigation" and therefore is not "distinct enough to allow meaningful judicial review." *In re U.S. Dep't of Justice*, 999 F.2d 1302, 1310, 1311 (8th Cir. 1993) (internal alteration and quotation marks omitted); *Bevis v. Dep't of State*, 801 F.2d 1386, 1389–390 (D.C. Cir. 1986) (holding that an agency must, at minimum, identify the "functional" categories of documents withheld under Exemption 7(A), conduct a document-by-document review to assign each record to a category, and "explain to the court how the release of each category would interfere with enforcement proceedings").

The same is true of Exemption 5. As a consequence of the highly generalized description of the documents falling into the categories purportedly subject to the deliberative process privilege, DOJ's index does not provide "necessary contextual information about the particular decision-making processes to which the withheld documents contribute," "the role the withheld documents played in those processes," and "sufficient detail as to the identities, positions, and job duties of the authors and recipients of the withheld documents," or state "whether these drafts were (1) adopted formally or informally, as the agency position on an issue; or (2) used by the agency in its dealings with the public" as is required to defend the exemption. *See Elec. Frontier Found. v. U.S. Dep't of Justice*, 826 F. Supp. 2d 157, 168–71 (D.D.C. 2011). DOJ's attempt to invoke the attorney work product doctrine suffers from the same deficiency, because the generalized descriptions in its index fail to provide the necessary detail concerning any specific ongoing or anticipated litigation, as required to invoke attorney work product protection. *See Hickman v. Taylor*, 329 U.S. 495, 509–10 (1947). For example, the *Vaughn* index asserts, without explanation, that one set of e-mails concerning an unidentified purported "ongoing enforcement action . . . [c]ontains attorney communications and work product." *See Vaughn* Index at 1. In another instance, it asserts, also without necessary details, that another set of e-mails concerns unidentified "potential areas/imperatives where two agencies could cooperate" and contains "attorney communications in contemplation of pending [and foreseeable] litigation." *Id.* at 2. The Cooper Declaration does not flesh out these bare-bones descriptions or otherwise provide the context necessary to determine that all of the elements for Exemption 5, including the claimed privilege, are met. *See* ECF No. 21-1 at ¶ 22 (repeating description from index). DOJ's index is therefore inadequate to justify its withholding of any documents on Exemption 5 grounds. *See Elec. Frontier Found.*, 826 F. Supp. 2d at 173.

B. The Index Does Not Adequately Describe the Potential Consequences of Disclosure as Required to Justify the Withholdings.

A *Vaughn* index's second task is, "for each withholding," to "discuss the consequences of disclosing the sought-after information." *King*, 830 F.2d at 223–24. "Categorical description of redacted material coupled with categorical indication of anticipated consequences of disclosure is clearly inadequate." *Id.* at 224. But that is all that DOJ's index does here.

With respect to Exemption 7, the index generically invokes the specter of interference with law enforcement proceedings but does not explain, as it must, why release of any particular document or concrete, functional category of documents would cause that result. *See Vaughn* Index at 3–4; *Bevis*, 801 F.2d at 1389–90. As for the claimed Exemption 5 withholdings, the index contains no justification for the cited exemption at all, beyond simply restating in conclusory fashion the exemption invoked. *See Vaughn* Index at 1–2. Nor does the index identify, beyond including the word "harm," any specified injury that would actually flow from the release of the requested records in this case. *See id.* In fact, all the index does is to parrot the legal standard for each exemption. These types of conclusory justifications, divorced from references to specific documents or appropriate categories of documents, are not enough to meet DOJ's burden to "provide[] a relatively detailed justification, specifically identif[ying] the reasons why a particular exemption is relevant and correlate[ing] those claims with the particular part of a withheld document to which they apply." *Judicial Watch*, 449 F.3d at 146; *see also New Orleans Workers' Ctr. for Racial Justice v. U.S. Immigration & Customs Enf't*, No. 15-cv-431, 2019 WL 1025864, at *26 (D.D.C. Mar. 4, 2019) (finding similar analysis in an index inadequate to support withholding under Exemption 7(A)).

The Cooper Declaration does nothing to resolve the *Vaughn* index's deficiencies, because in most cases, all it does is repeat the assertions in the index wholesale. *See* Cooper Decl.

¶¶ 19, 25. To the extent that it adds any additional justification, those too are conclusory and, consequently, inadequate. For Exemption 7, the declaration states generically that "[r]elease . . . could reveal the scope and focus of the investigations; tip off individuals or states to information of interest to law enforcement; provide subjects the opportunity to alter evidence to avoid detection; and reveal the core of the Department's review of compliance with these statutes." *Id.* ¶ 19. But even accepting DOJ's claim, based on the DOJ Letter, that it has ongoing enforcement proceedings against 44 states and the District of Columbia, it would need to offer a concrete explanation, tied to any of those supposed proceedings or specific to the nature of any document or functional category of documents, as to why release of the withheld documents would interfere with those proceedings. *See infra* at 19–23 (Part III.A). Neither the index nor the Cooper Declaration provides this required detail. As for Exemption 5, the Cooper Declaration states that release of deliberative materials could "reveal[] potential statutory violations, and analyses, opinions and recommendations concerning these potential violations when no final determination was made as to whether the potential violations were in fact violations that needed to be addressed in the manner suggested by the analyses and recommendations." Cooper Decl. ¶ 22. Here too, these broad, nonspecific claims do not identify with particularity any material that falls within the privilege. *See infra* at 23–28 (Part IV).

Thus, for the claimed Exemption 7 and Exemption 5 withholdings alike, the Cooper Declaration merely "recite[s] the language of the FOIA exemption and refer[s] to the Vaughn indices, without explaining why the release of the information would compromise law enforcement," *Boyd v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, Civil Action No.

05-1096 (RMU), 2006 WL 2844912, at *9 (D.D.C. Sept. 29, 2006), or interfere with DOJ's deliberative processes or delivery of candid legal advice within the agency, *id.* at *6.[6]

* * *

In sum, DOJ has offered only generic and conclusory descriptions of the documents it has withheld and the bases for applying FOIA Exemptions 5 and 7 to withhold those documents in full. Because it is DOJ that "bears the burden of establishing the applicability of the claimed exemption," *Assassination Archives & Research Ctr.*, 334 F.3d at 57, it is required to identify *what* documents are being withheld, to tie that information to an explanation for *why* those documents are being withheld under a given exemption or to offer evidence that establishes the necessary elements for the claimed exemption, and to demonstrate why the exemption justifies withholding the documents *in full*. Neither the index provided, nor the Cooper Declaration, provides this required detail. DOJ's failure to satisfy its burden entitles the Brennan Center to summary judgment and an order directing DOJ to release the requested records or, at a minimum, an order directing DOJ to amend and augment its *Vaughn* index.

[6] DOJ's *Vaughn* index states that certain records related to Kentucky, which have been released to the Brennan Center, fall within the fourth document group in the *Vaughn* index. DOJ's failure to break out those documents from the 20,217 pages in that group that DOJ has withheld improperly prevents the Brennan Center and this Court from assessing whether records that DOJ has withheld that relate to *other* states should be released in light of the decision to release the Kentucky records. *See Am. Immigration Lawyers Ass'n v. U.S. Dep't of Homeland Sec.*, 852 F. Supp. 2d 66, 80 (D.D.C. 2012) ("Where an agency has publicly disclosed information that is similar to what is being withheld, its *Vaughn* submission must be sufficiently detailed to distinguish the withheld information from the public information."); *Army Times Pub. Co. v. U.S. Dep't of Air Force*, 998 F.2d 1067, 1071–72 (D.C. Cir. 1993) ("[T]he failure of the Air Force to offer some distinguishing feature of the withheld information strongly suggests that at least some of the information contained in the withheld surveys is similar to that already released, and also non-exempt."). This provides a third reason why DOJ's *Vaughn* index is inadequate. *See Gatore v. U.S. Dep't of Homeland Sec.*, 292 F. Supp. 3d 486, 494 (D.D.C. 2018).

III. THE INFORMATION CONTAINED IN THE *VAUGHN* INDEX IS PATENTLY INSUFFICIENT TO JUSTIFY WITHHOLDING 20,217 PAGES OF RECORDS BASED ON EXEMPTION 7(A).

Exemption 7(A) permits an agency to withhold "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A). "To justify withholding, the DOJ must [] demonstrate that disclosure (1) could reasonably be expected to interfere with (2) enforcement proceedings that are (3) pending or reasonably anticipated." *Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Justice*, 746 F.3d 1082, 1096 (D.C. Cir. 2014) (internal quotation marks omitted). DOJ has not provided evidence that the withheld records do relate to an ongoing or reasonably anticipated law enforcement proceeding *or*, even if they do, that disclosure could be reasonably expected to interfere with those proceedings. Consequently, its invocation of Exemption 7(A) should be rejected.

A. DOJ Has Not Demonstrated the Existence of a Pending or Reasonably Anticipated Enforcement Proceeding.

DOJ has not established the threshold requirement for withholding documents under Exemption 7(A)—a pending or reasonably anticipated law enforcement proceeding. To do so, DOJ must, at a minimum, point to a "concrete prospective law enforcement proceeding[]" triggering its withholding of responsive records. *Nat'l Sec. Archive v. FBI*, 759 F. Supp. 872, 883 (D.D.C. 1991) (rejecting FBI's attempt to withhold pursuant to 7(A) as insufficiently specific and concrete where it claimed disclosure would interference with its "overall ongoing foreign counterintelligence program"). It has not.

First, DOJ has not identified, in any concrete way, a *pending* law enforcement proceeding that supports withholding under Exemption 7(A). It asserts that it has "active, ongoing

enforcement proceedings regarding 44 states and the District of Columbia." *Vaughn* Index at 2. But it does not elaborate on this statement. The only evidence that it offers, implicitly, is the DOJ Letter, but that letter was a mere request for information concerning NVRA and HAVA compliance to virtually all the States and the District of Columbia. Nothing in the DOJ Letter suggests that DOJ had any concrete suspicion of any violation of those statutes by the recipient States or other predicate for opening an investigation or enforcement proceeding, much less demonstrates the existence of open or "reasonably anticipated" enforcement proceedings as required to justify withholding under Exemption 7(A).[7] *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1115 (D.C. Cir. 2007).

Indeed, the text of the DOJ Letter suggests the exact opposite—that it had no concrete suspicion of any violation—because the letter states that it is asking for information, from which DOJ might *later* identify a sufficient predicate to pursue an investigation or enforcement action. Compl. Ex. A at 1, 3 (describing DOJ's action as a "review[]" of "voter registration list maintenance procedures" and characterizing request for information as part of DOJ's "nationwide efforts to monitor NVRA compliance"). That the DOJ Letter was sent to *every* State covered by the NVRA further undermines any notion that the DOJ had a concrete suspicion of any actual or suspected violation of the federal election laws at the time it sent the letter; rather, it suggests that DOJ sent it to gather information to determine *whether* there were grounds to initiate an investigation. Finally, nothing in the DOJ Letter suggests that it was the opening

[7] DOJ has not stated, or suggested, that it suspects any *criminal* NVRA violations. *See* 52 U.S.C. § 20511. With a criminal investigation, at least, even the earliest steps, such as a search warrant, must be based on some articulated suspicion that suggests an enforcement proceeding is possible. *See Juarez v. U.S. Dep't of Justice*, 518 F.3d 54, 59 (D.C. Cir. 2008) ("[T]he criminal investigation remained ongoing, and from that the district court could reasonably infer that this investigation may eventually lead to a prosecution."). There is no evidence of such suspicion here.

move in an investigation that DOJ *expected* to lead to enforcement proceedings as to any specific state. *See Shearson v. U.S. Dep't of Homeland Sec.*, No. 16-cv-1478, 2007 WL 764026, at *4 (N.D. Ohio Mar. 9, 2007) (finding the agency's "generalized statement that border investigations are 'ongoing,'" inadequate to "satisfy the government's burden to demonstrate that the investigation is 'likely to lead' to an enforcement proceeding.").[8]

A mere request for information—here, a general call for information—bears no resemblance to the kinds of law enforcement proceedings that have been found to be adequate to support this threshold requirement of Exemption 7(A). *See, e.g., Sussman,,* 494 F.3d at 1114 (remanding to determine whether records relevant to "pending grand jury investigations" could "in fact reasonably be expected to interfere with enforcement proceedings"); *Citizens for Responsibility & Ethics in Washington*, 746 F.3d at 1098 ("In the typical case, however, the requested records relate to a specific individual or entity that is the subject of the ongoing investigation, making the likelihood of interference readily apparent."); *Campbell v. U.S. Dep't of Health & Human Servs.*, 682 F.2d 256, 265 (D.C. Cir. 1982) (remanding for "a more focused and particularized review" of agency's invocation of Exemption 7(A) as to third party's FOIA request for "information to which a potential [investigative] target apparently has access and, indeed, has submitted to the agency"). On the contrary, documents compiled, as they apparently were here, during a routine audit or compliance review, absent any particularized suspicion of wrongdoing, do not warrant protection under Exemption 7(A). *See Pratt v. Webster*, 673 F.2d 408, 421 (D.C. Cir. 1982) ("In order to pass the FOIA Exemption 7 threshold, [a law enforcement] agency must establish that its investigatory activities are realistically based on a

[8] On reconsideration, the District Court affirmed its Exemption 7(A) ruling, reversed its earlier partial grant of summary judgment in the government's favor, and ordered it to produce the withheld documents. *See* 2008 WL 928487 (N.D. Ohio Apr. 4, 2008).

legitimate concern that federal laws have been or may be violated or that national security may be breached. Either of these concerns must have some plausible basis and have a rational connection to the object of the agency's investigation.").[9]

The Cooper Declaration confirms this reading of the DOJ Letter. It describes the letter as part of a generalized "review of states' compliance." Cooper Decl. ¶ 23. And it makes clear that DOJ had not made any determination as to whether any recipient was out of compliance at the time it sent the letter. *See, e.g.*, *id.* ¶ 20 (describing the records as related to DOJ's efforts "investigating the states' *compliance and noncompliance* with the NVRA and HAVA and the voting maintenance list requirements") (emphasis added); *id.* ¶ 24 ("*If* CRT determines that a state is not in compliance with the NVRA, CRT can initiate a lawsuit against the state to enforce the NVRA.") (emphasis added).

Nor has DOJ stated, much less shown, that the initial information supplied in response to the DOJ Letter did lead it to initiate law enforcement proceedings against all 44 States and the District of Columbia. It has identified only one actual proceeding, against Kentucky, which resulted in a public settlement agreement.[10] Consent Judgment, *Judicial Watch v. Grimes*, No. 3:17-cv-00094-GFVT (E.D. Ky. July 3, 2018). Nor is it reasonable to assume that all of the remaining recipients of the DOJ Letter were out of compliance. Just as DOJ has not identified

[9] *See also, e.g.*, *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 154 (1989) (recognizing that documents gathered during routine audit of defense contractor had been compiled for non-law-enforcement purposes, even if they came within Exemption 7(A)'s protection several years later when an investigation into suspected wrongdoing commenced); *Philadelphia Newspapers, Inc. v. U.S. Dep't of Health & Human Servs.*, 69 F. Supp. 2d 63, 67 (D.D.C. 1999) (implicitly recognizing that documents compiled during routine compliance audit would not meet Exemption 7(A)'s threshold requirement, but finding that law enforcement exemption applied because "the audit focused on specific suspected violations").

[10] As discussed in more detail in Section III.B, *infra*, the fact that the terms of this settlement agreement are public undermines DOJ's argument that release of the requested records could interfere with ongoing proceedings by revealing its legal positions or investigative strategies.

any particularized suspicion that any of the 44 State recipients or the District of Columbia was out of compliance with the NVRA, it has not identified any reason to believe that the responses contained evidence that *all*, or even most, are in violation of the NVRA such that DOJ is now investigating their compliance.[11]

Second, DOJ has not established a *reasonably anticipated* law enforcement proceeding with respect to any given State that received the DOJ Letter. Again, all DOJ has pointed to is the DOJ Letter itself. DOJ has not shown that it sent the letter based on some articulated suspicion of violations of the election laws or other predicate. It has not suggested, much less shown, that the responses indicated that all of the recipients were potentially out of compliance. Under these circumstances, DOJ has offered no affirmative evidence that it likely will initiate an actual law enforcement proceeding against any other recipient of the DOJ Letter, thus negating the required premise for invoking Exemption 7(A).

Because DOJ has not established this threshold requirement for withholding documents under Exemption 7(A), it has not met its burden to justify withholding the 20,000-plus pages of responsive documents under that exemption. *See Badran v. U.S. Dep't of Justice*, 652 F. Supp. 1437, 1440 (N.D. Ill. 1987) ("If an agency could withhold information whenever it could imagine circumstances where the information might have some bearing on some hypothetical enforcement proceeding, the FOIA would be meaningless.").

B. DOJ Has Not Established the Interference Requirement.

DOJ contends that disclosure of the States' responses to its request for information would interfere with any potential law enforcement proceedings that stem from those submissions by

[11] In the event that DOJ subsequently initiated proceedings against any of the States, it is DOJ's burden to provide such evidence and explain how the disclosure of related documents would interfere with such proceedings, if any. DOJ has not done so on this record.

revealing its "strategy and evaluation of the evidence," Cooper Decl., ¶ 19, but has offered neither logical nor evidentiary support for this conclusory argument.

To start, the notion that the *States'* submissions in response to a publicly-available letter would reveal any information about *DOJ's* views simply makes no sense. The largest category of documents that DOJ has withheld under this Exemption is "emails, letters, and other types of documents *provided by the 45 chief election officials of the states and D.C.* in response to CRT's June 28, 2017 letter." *Vaughn* Index at 3 (emphasis added); Cooper Decl. ¶ 18. These documents are further described as including "narrative" items, "legislation, draft versions of proposed bills, bills, regulations, codes, policies, guidance, brochures, and election manuals or descriptions regarding voter registration procedures, election processes, convicted felons, and death notices," and "discussion of case law on particular issues such as the NVRA and HAVA." *Vaughn* Index at 3; Cooper Decl. ¶ 18. As such, nearly all of this information appears to be public record: laws, regulations, and policies of the States.[12] Moreover, any legal analysis submitted by the States would reflect the *States'* own views, not those of DOJ as required to invoke Exemption 7(A). Finally, all of this information would also already be known to the submitting States, and "[i]t is quite clear that the government's case cannot be hindered by release of information, the substance of which is already known to the subject." *E. Coast Eng'g, Inc. v. Alexander*, No. 80-2752, 1981 WL 2308, at *2 (D.D.C. June 22, 1981); *Wright v. Occupational Safety & Health Admin.*, 822 F.2d 642, 646 (7th Cir. 1987) ("[T]his category may

[12] States' laws, regulations, and policies, of course, exist independently of the federal government's law enforcement purposes. DOJ's own position is that "records exist[ing] independently of the stated law enforcement purpose" should be "denied protection under Exemption 7." *See* U.S. Dep't of Justice, *Guide to the Freedom of Information Act, Exemption 7* at 13–14 & n.30 (May 21, 2014), *available at* https://www.justice.gov/oip/doj-guide-freedom-information-act-0 (citing *Lardner v. U.S. Dep't of Justice*, 398 F. App'x 609, 611 (D.C. Cir. 2010)).

contain documents that Union Oil itself provided to OSHA during the course of the agency's investigation. In that case, it is not clear to us why public disclosure of this information would provide Union Oil with any information that it does not already have.").

DOJ's attempt to sidestep this problem by suggesting that disclosure of one State's submissions could somehow interfere with its compliance review of *another* State, supposedly because it could "reveal the scope and focus of the investigations; tip off individuals or states to information of interest to law enforcement; provide subjects the opportunity to alter evidence to avoid detection; and reveal the core of the Department's review of compliance with these statutes," Cooper Decl. ¶ 19, also strains credulity. DOJ sent the *same* letter to *all* States. A State's responses to that letter can reveal no information about DOJ's review that DOJ did not reveal itself when sending the initial letter. "It is not sufficient for an agency merely to state that disclosure would reveal the focus of an investigation; it must rather demonstrate *how* disclosure would reveal that focus." *Sussman*, 494 F.3d at 1114. DOJ has not done so here.

What is more, DOJ does not explain how violations of the law at issue here, the NVRA, are susceptible to these risks. Case law in this district describes typical categories of concrete "'interference' at which section 7(A) is directed," as including intimidation of witnesses, fabricating alibis, or altering evidence. *See, e.g., North v. Walsh*, 881 F.2d 1088, 1097–98 (D.D.C. 1989) (collecting cases). DOJ offers no reason to believe that analogous concerns are present here, in the context of State officials' compliance with the NVRA, as opposed to, for example, potential harms arising in the more common criminal context.

The most DOJ says to justify raising the specter of interference is its claim that "a state made aware of data and information pertaining to another state could seek to manipulate its own data in order to present a more favorable picture of compliance with NVRA and HAVA."

Cooper Decl. ¶ 19. But it is not as if the States can alter or destroy the "evidence" relevant to a NVRA violation without detection, so even if States did change the manner in which they *presented* their data to DOJ, the underlying, raw data would still exist and be available to DOJ, to analyze as it sees fit.[13] Moreover, as DOJ's index and declaration make plain, at least some of the States' responses compile public documents such as laws. But DOJ's position cannot properly rest on a concern that a State may amend its laws in response to the disclosure of another State's responses to its Letter. Any such amendment would occur in full view of the public; there is no risk of illicit alteration or destruction of evidence here. And to the extent that any State might react after seeing the disclosure of another State, DOJ offers no reason to believe the State might not do so in a way that brings it *into* rather than *out of* compliance with the NVRA—which is, of course, the ultimate goal—to achieve compliance with the NVRA. Indeed, DOJ's own description of its compliance review as an open, back-and-forth discussion with the States renders its assertions of a possible harm to its investigation implausible. *See Coastal States Gas Corp. v. U.S. Dep't of Energy*, 617 F.2d 854, 870 (D.C. Cir. 1980) ("[I]t appears highly unlikely that these documents would tip the Government's hand . . . since the regulatory scheme . . . is one of discussion and consultation . . . in the course of an audit in an attempt to achieve voluntary compliance or a consent agreement." (internal quotation marks omitted)).

[13] The *Vaughn* index does not actually identify "data" as a category of responsive documents that it has withheld. *See Vaughn* index at 2–4. This confirms the inadequacy of the index and declaration. *See supra* at 8–18. That aside, DOJ does not explain how one State's access to another state's data would allow the observing state to manipulate its own data to feign compliance, particularly because the State will not have access to DOJ's view of the sufficiency of any State's data. *James Madison Project v. U.S. Dep't of Justice*, 208 F. Supp. 3d 265, 292 (D.D.C. 2016) ("The agency must demonstrate specifically how each document or category of documents, if disclosed, would interfere with the investigation.").

DOJ also states that certain withheld documents cover its subsequent requests for additional information to some States, and the States' responses. *See Vaughn* Index at 3. It does not offer any explanation, unique to this category of documents, of how disclosure of those documents would interfere with its supposed investigation. *See Bevis*, 801 F.2d at 1389–90 (requiring a separate justification for withholding of each functional category of records). Even if new information were included within the States' supplemental responses, DOJ cannot withhold such materials without making a particularized showing as to how release of those specific documents would interfere with some open or reasonably anticipated law enforcement investigation or enforcement proceeding. *Id.*; *James Madison Project*, 208 F. Supp. at 292.

Finally, DOJ does not explain why disclosure of any records related to Kentucky would interfere with law enforcement proceedings, in light of its public settlement with the State. *See* Consent Judgment, *Judicial Watch v. Grimes*, No. 3:17-cv-00094-GFVT (E.D. Ky. July 3, 2018). DOJ acknowledges that it has released "approximately 100 pages regarding the NVRA and HAVA investigation" into Kentucky. *Vaughn* Index at 3. As justification for releasing some, but not all, of the documents related to Kentucky, the Cooper Declaration states only that the Kentucky "proceeding is in a different stage." Cooper Decl. ¶ 15. That conclusory statement does not explain why Kentucky's full responses to the DOJ Letter cannot be released now that a settlement has been reached, or why any other documents related to Kentucky cannot be released. Moreover, the Declaration's statement that the Kentucky "proceeding is in a different stage" ignores that the public settlement with Kentucky undermines any assertion that the disclosure of the withheld documents relating to other states would interfere with DOJ's compliance reviews of those states by "tipping off" those states as to DOJ's views. These publicly available documents set forth legal positions concerning the NVRA and DOJ's findings

as to Kentucky's compliance, which, per DOJ's reasoning, inherently disclose the "scope and focus" of its compliance reviews. *See* Cooper Decl. ¶ 19.

* * *

Because DOJ has not demonstrated and cannot demonstrate either requirement for invoking Exemption 7(A), the Brennan Center is entitled to summary judgment and an order directing DOJ to produce all documents improperly withheld pursuant to Exemption 7(A).

IV. EXEMPTION 5 DOES NOT JUSTIFY THE WITHHOLDING OF THE REMAINING RECORDS.

Exemption 5 provides that an agency may withhold "inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). To justify withholding a document under this exemption, DOJ must show that the document "satisf[ies] two conditions: its source must be a Government agency, and it must fall within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency that holds it." *U.S. Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001); *see also 100Reporters LLC v. U.S. Dep't of Justice*, 248 F. Supp. 3d 115, 145 (D.D.C. 2017) (litigants invoking Exemption 5 must show that the subject documents are "normally privileged in the civil discovery context"). DOJ vaguely invokes both the deliberative process and attorney work product privileges in its *Vaughn* index,[14] but has not met its burden to establish that either actually applies.

[14] There is no invocation of attorney-client privilege. *See* Vaughn Index at 1; Cooper Decl. ¶¶ 22–26 (repeatedly invoking only the "attorney work product and deliberative process privileges under Exemption 5").

A. Deliberative Process Privilege.

"[A]s embodied in Exemption 5, the [deliberative process] privilege protects documents that are both 'predecisional' *and* 'deliberative.'" *Pub. Citizen, Inc. v. Office of Mgmt. & Budget*, 598 F.3d 865, 874 (D.C. Cir. 2010) (emphasis added). A document is "predecisional if it was generated before the adoption of an agency policy" and is "deliberative if it reflects the give-and-take of the consultative process." *Id.*; *see also Access Rpts. v. U.S. Dep't of Justice*, 936 F.2d 1192, 1195 (D.C. Cir. 1991) (the "key question" in determining whether material is deliberative "is whether disclosure of the information would discourage candid discussion within the agency" (internal quotation marks and citation omitted)). DOJ has not met its burden to establish either requirement as to the four groups of documents for which it cites Exemption 5 in its *Vaughn* index.

Group 1. DOJ states that this e-mail chain relates to "the development of responses to Congressional inquiries for committee hearings on voting issues." *Vaughn* Index at 1. This vague description does not clearly establish that the document is "predecisional,"[15] as it provides no clarity as to whether the document was reflected in any final responses to the congressional inquiries. Nor does the description establish that the document involved the "give-and-take" of deliberative process. *Pub. Citizen, Inc.*, 598 F.3d at 874. Indeed, the description gives neither the Brennan Center nor this Court sufficient information to assess whether the document meets the requirements for Exemption 5 withholding, as opposed to containing the type of material—such as factual material, summaries of existing policies, or reflecting final decisions—that would not qualify for the privilege. *See, e.g., Pub. Citizen, Inc.*, 598 F.3d at 876 ("A document that

[15] DOJ appears to assert that the e-mail chain's "pre-decisional" material includes "internal attorney communications," *Vaughn* Index at 1, but DOJ does not expressly claim attorney-client or work product privilege as to such communications.

does nothing more than explain an existing policy cannot be considered deliberative."); *Coastal States Gas Corp.*, 617 F.2d at 868 ("The identity of the parties to the memorandum is important; . . . a document moving in the opposite direction is more likely to contain instructions to staff explaining the reasons for a decision already made.").

Group 2. DOJ states that these e-mail chains "concern[] the conduct of an open and ongoing enforcement action regarding the federal voting rights statutes." *Vaughn* Index at 1; *see also* Cooper Decl. ¶ 25 ("[T]hese discussions include preliminary assessments by attorneys about compliance or noncompliance with the NVRA and HAVA."). Here as well, DOJ has not met its burden to show that the deliberative process privilege applies sufficient to justify the application of the deliberative process privilege, because the *Vaughn* index's brief description does not foreclose the possibility that the e-mail chain contains factual information about the proceedings. Moreover, the index provides virtually no detail concerning "the identities, positions, and job duties of the authors and recipients of the withheld documents," without which the Brennan Center and the Court cannot assess the validity of the claim. *See Elec. Frontier Found.*, 826 F. Supp. 2d at 168–171.

Group 3. DOJ states that this e-mail chain "discuss[es] potential areas/imperatives where two agencies could cooperate." *Vaughn* Index at 2. Here again, its description does not meet the agency's burden to clearly establish that the document reflects the deliberative process claimed in the *Vaughn* index, this time because DOJ does not explain how the discussion of potential inter-agency cooperation reflects substantive "give-and-take of the consultative process" for which deliberative process privilege exists, as opposed to merely administrative matters. *Coastal States*, 617 F.2d at 866. Without these details, DOJ has failed to establish

"what deliberative process is involved, and the role played by the documents in issue in the course of that process" as required to invoke the deliberative process exemption. *Id.* at 868.

Group 4. Among this set of 20,217 pages,[16] DOJ purports to withhold an unspecified subset of pages pursuant to Exemption 5 based in part on the deliberative process privilege. As best as the Brennan Center can discern, the affected documents appear to be "draft responses, internal analysis and discussions, strategies, and recommendations regarding possible litigation against a state for violations of the NVRA or HAVA." Cooper Decl. ¶ 22. As with Groups 1 and 2, to the extent the Brennan Center has correctly pieced together DOJ's filings, DOJ's explanation does not provide enough information to establish that these documents do not include factual information or information relating to final decisions or completed actions to which the deliberative process privilege does not apply.

B. Attorney Work Product.

The facial inadequacy of DOJ's *Vaughn* index and declaration, *see* Section II, *supra*, makes it impossible for the Brennan Center to address or evaluate the sufficiency of DOJ's claim that certain, unidentified documents within the larger set of withheld materials are subject to withholding as attorney work product. Particularly with respect to the substantial volume of documents in Group 4, the *Vaughn* index fails to identify which "include[d] documents" among the 20,217 pages of records are also claimed to be exempted as attorney work product. ECF No. 21-3 at 2; *see Comptel v. FCC*, Civil No. 06-1718, 2012 WL 6604528, at *15 (D.D.C. Dec. 19, 2012) (agency's index entry for "[a]ttorney-client, deliberative process e-mail containing attorney work product analysis of SBC investigation evidence, recommendations

[16] DOJ's *Vaughn* index also states that it has withheld these records under Exemption 7(A). *See* ECF No. 21-3 at 2–4. As discussed, DOJ has not met its burden to show that this category of records can properly be withheld under Exemption 7(A). *See supra* at 19–28.

regarding future actions and a request for approval of settlement provision" impermissibly invoked "distinct privileges without separately providing support for each" and provided "too little detail regarding the agency's justification for invoking the deliberative privilege").

Moreover, for reasons similar to those set forth above with respect to DOJ's invocation of FOIA Exemption 7(A), *see supra* at 19–23, DOJ has simply failed to demonstrate ongoing or anticipated litigation to support its claims for work product protection. The work product doctrine does not protect material prepared because of an abstract fear or speculation of possible litigation; rather, to qualify, the work product must have been prepared by an attorney in contemplation of litigation. *See Hickman*, 329 U.S. at 509–10. DOJ has not cited any actual *litigation* in anticipation of which the unspecified withheld documents were prepared (as opposed to, for example, mere legal analysis designed to inform internal understandings about the scope of the NVRA). Rather, the Cooper Declaration states that "*[i]f* CRT determines that a state is not in compliance with the NVRA, CRT *can* initiate a lawsuit against the state to enforce the NVRA." ECF No. 21-1 ¶ 24 (emphases added). That summary of CRT's enforcement jurisdiction does not meet DOJ's burden to show that the withheld documents contain attorney work product and are properly subject to withholding under Exemption 5.

* * *

The Brennan Center respectfully requests that the Court direct DOJ to produce those records improperly withheld pursuant to FOIA Exemption 5. At a minimum, however, DOJ should be directed to amend its *Vaughn* index to permit the Brennan Center and the Court to evaluate whether any documents properly may be subject to withholding under the deliberative process privilege or as attorney work product.

V. DOJ HAS NOT SHOWN THAT IT RELEASED ALL SEGREGABLE INFORMATION.

DOJ is not permitted to withhold entire documents simply because some part of them may be subject to a FOIA exemption. Rather, it is expressly required by statute to disclose "reasonably segregable," non-exempt information, after redacting any exempt information. 5 U.S.C. § 552(b)(9); *see also, e.g.*, *Farrugia*, 2006 WL 335771, at *8 ("Under the FOIA, if a record contains information that is exempt from disclosure, any reasonably segregable information must be released after deleting the exempt portions, unless the agency can demonstrate that the non-exempt portions are inextricably intertwined with exempt portions.").[17] To establish that all reasonably segregable, non-exempt information has been disclosed, an agency must show "with 'reasonable specificity'" that the information that it has withheld cannot be further segregated. *Armstrong v. Exec. Office of the President*, 97 F.3d 575, 578–79 (D.C. Cir. 1996) (Government permissibly explained on a document-by-document basis "why the document is exempt" as to redacted portion and "why no portion of it" can be further segregated). A court "errs if it simply approves the withholding of an entire document without entering a finding on segregability, or the lack thereof." *Kidder v. FBI*, 517 F. Supp. 2d 17, 32 (D.D.C. 2007) (internal quotation marks and citation omitted).

Even assuming that the withheld documents contain some exempt information, it defies logic that all 20,200 withheld pages consist of entirely exempt, non-segregable material. DOJ's unsupported and nonspecific assertion that it "conducted a line-by-line review of the withheld

[17] DOJ incorrectly reduces its burden here, claiming that "the deliberative process privilege also protects factual materials that are *closely* intertwined with opinions, recommendations, and deliberations," Def.'s Br. at 6 (emphasis added). The proper standard is, as stated above, that factual material must be segregated and released unless it is "*inextricably* intertwined" with deliberative material. *See Farrugia*, 2006 WL 335771, at *8.

information" and concluded that "[n]o additional reasonably segregable information can be released," supposedly because the "remaining 20,200 pages contain[] information about open and ongoing law enforcement investigations," Cooper Decl. ¶ 28, adds nothing to the analysis. This Court has explained that "for *each* entry" in its *Vaughn* index, at a minimum, a defendant "is required to specify in detail which portions of the document are disclosable and which are allegedly exempt." *Defs. of Wildlife v. U.S. Border Patrol*, 623 F. Supp. 2d 83, 90 (D.D.C 2011) (internal quotation marks and citation omitted) (emphasis in original). The volume of documents at issue here does not excuse or lessen DOJ's obligation—the same duty to segregate applies whether there are 10 or 100,000 documents being withheld. *Anderson v. CIA*, 63 F. Supp. 2d 28, 30 (D.D.C. 1999).

Because DOJ's *Vaughn* index here fails to explain even on a group-by-group basis for the four categories of documents—much less on a document-by-document basis—how any non-exempt information is so inextricably intertwined with exempt information such that a partial, redacted production would not be feasible, it is insufficient as a matter of law. Thus, the Brennan Center is entitled to an order directing DOJ to perform an adequate segregability analysis, release all non-exempt, segregable portions of those documents, and describe in sufficient detail the portions of documents that it continues to withhold in an amended *Vaughn* index, both as to the documents that have already been withheld and as to any documents that a proper search uncovers.

CONCLUSION

The Brennan Center respectfully requests that this Court deny DOJ's motion for summary judgment and grant the Brennan Center's cross-motion for summary judgment; order DOJ to conduct a new search for and produce, on an expedited basis, all records responsive to

the NVRA FOIA; and direct DOJ to produce, on an expedited basis, those records that it improperly has withheld under FOIA Exemptions 5 and 7(A). At a minimum, DOJ should be ordered to amend its *Vaughn* index to provide sufficient detail regarding the scope of its search and the basis for its withholdings.

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